No. 12734

United States Court of Appeals
For the Ninth Circuit

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, *Appellant*,

vs.

ARTHUR BENZEL *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

EGGERMAN, ROSLING & WILLIAMS,
DEWITT WILLIAMS,
Attorneys for Appellant.

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Seattle 1, Washington.

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has jurisdiction of this appeal from said final decision of the District Court by virtue of Title 28, U.S. Code, §1291, (28 U.S.C.A., §1291).

STATUTES INVOLVED

Appellant brought this action pursuant to Rem. Rev. Stat. of the State of Washington, §5831-4 and §5831-6 (Laws of 1941, Chap. 103) reading as follows:

> Section 5831-4.—Preferences by insolvent corporations.—Definitions. Words and terms used in this act shall be defined as follows: (a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class (L. '41, ch. 103, §1).
>
> Section 5831-6—Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value re-

> covered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded (L. '41, ch. 103, §3).

As stated in *Meier v. Commercial Tire Co.,* 179 Wash. 449 at 451, 38 P.(2d) 383 at 384, the rule now found in these statutes was previously a court made rule. It was enacted into statute first in 1931 and later in 1941 in the form above quoted. The court made rule had been applied in many Washington cases since *Thompson v. Huron Lumber Co.,* 4 Wash. 600, 30 Pac. 741, that payments made by insolvent corporations must be returned upon demand by a liquidating officer.

This rule was frequently invoked by trustees in bankruptcy to recover preferential payments and illustrative cases are *Williams, as Trustee, v. Davidson,* 104 Wash. 315, 176 Pac. 334, and *Woods as Trustee, v. Metropolitan National Bank,* 126 Wash. 346, 218 Pac. 266. In the latter case the court stated:

> "The principle on which the receiver based his action would seem to be well founded in law. Ever since the case of *Thompson v. Huron Lumber Co.,* 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, this court has adhered to the doctrine that an insolvent corporation may not prefer its creditors; that, although an individual creditor may do so, even to the exhaustion of his property, the right does not exist in a corporation; that its property on insolvency becomes a trust fund for the benefit of all of its creditors to be equally and ratably distributed

among them, *Conover v. Hull,* 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810; *Benner v. Scandinavian American Bank,* 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914-D 702; *Jones v. Hoquiam Lumber & Shingle Co.,* 98 Wash. 172, 167 Pac. 117; *Simpson v. Western Hardware & Metal Co.,* 97 Wash. 626, 167 Pac. 113; *Williams v. Davidson,* 104 Wash. 315, 176 Pac. 334.

"The foregoing citations announce the further rule, also, that, in an action or suit on the part of the receiver to recover as for an unlawful preference, it is not necessary that he show that the creditor, at the time of receiving the preference, had knowledge or reasonable cause to believe that the corporation was insolvent. See particularly, *Jones v. Hoquiam Lumber & Shingle Co., supra; Williams v. Davidson, supra.*

"Nor were the rights of the parties changed in respect to the right to recover the payments as an unlawful preference by the transfer of the proceedings into the bankruptcy court. By §70e of the bankruptcy act, it is provided that the Trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred from the person to whom it was transferred. That this section gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law, and is not subject to the four months' limitation of other sections (60b, 67e) of the Bankruptcy Act, was held by the Supreme Court of the United States in *Stellwagen v. Clum,* 245 U.S. 605."

OPINION BELOW

This action was one of a group brought by the Trustee in Bankruptcy of Northwest Chemurgy Cooperative against certain creditors upon identical forms of complaint to recover alleged preferential payments under the statutes of the State of Washington above referred to.

Many of these cases, including this case, are listed following *Engstrom v. DeVos,* 81 F. Supp. 854. In those cases motions to dismiss were addressed to the complaint and overruled by said opinion. An appeal was taken in one of said cases testing the ruling of the District Court in holding that the complaints stated a cause of action. Upon said appeal the District Court was affirmed by United States Court of Appeals for the Ninth Circuit (*Schneidmiller v. Engstrom,* 177 F.(2d) 196). Pursuant to stipulation contained in the appeal record in the *Schneidmiller* case judgment for the Trustee was therefor entered against all of the defendants so stipulating, the only exceptions being this case and the case against R. M. Wiley which is also now on appeal to the Court of Appeals from a judgment of dismissal. (No. 12733).

This case and the *Wiley* case were submitted on written agreed statements of facts.

The District Court concluded from the findings that the action should be dismissed and entered judgment of dismissal.

The decision of the District Court was unreported.

STATEMENT OF THE CASE

After the allegations of the complaint were held to state a cause of action in *Schneidmiller v. Engstrom,* 177 F.(2d) 196, the parties to this action entered into an Agreed Statement of Facts for submission to the court (Tr. 10-16). Paragraph I of the agreed statement in substance and effect simply restated as agreed facts Paragraphs 1 to 7 inclusive of the complaint so that it is agreed that Northwest Chemurgy Cooperative is a bankrupt, that appellant is the duly authorized and acting trustee, that at all times material the preference statutes of the State of Washington (§§ 5831-4 and 5831-6 of Rem. Rev. Stat. of the State of Washington) were in full force and effect, that Chemurgy was insolvent within the meaning of said statutes for at least four months prior to May 29, 1947 (which period includes the date of February 3, 1947 on which date the check here involved was paid out of the bank account of Chemurgy), that during all of said four months and at all times subsequent thereto there existed and now exists against said insolvent corporation and said bankrupt estate claims of general unsecured creditors upon which no payments have been made and the claims allowed and allowable are greatly in excess of the estate assets (Tr. 10-12).

The effect of said agreement on the facts was to establish beyond question that the payment here involved was a preferential payment recoverable by appellant under said Washington statutes subject only to the final point as to whether the payment to appellee here involved was a transfer of property to a creditor.

On the facts of this payment the District Court found by Finding II as follows:

II.

"On or about January 3, 1947, the defendant Arthur Benzel, by endorsing and delivering to Northwest Chemurgy Cooperative a negotiable warehouse receipt covering 1,000 bushels of wheat, sold and delivered said wheat to said corporation at the agreed net price, after deducting charges for handling, insurance and storage of $72.50, of $1,627.50. On or about January 13, 1947, Northwest Chemurgy Cooperative drew its check for said wheat payable to defendant, being check No. 7090 dated January 13, 1947, drawn on the Wenatchee Valley Branch of the Seattle-First National Bank, Wenatchee, Washington, in said sum of $1,627.50, which check the defendant received on January 14, 1974. Said check has been admitted as an exhibit in this action. On January 18, 1947, defendant first deposited said check for collection in the Ritzville Branch of the Old National Bank. Said bank presented said check for collection to the Wenatchee Valley Branch, Seattle-First National Bank, and said check was returned because there were no funds on deposit in said Wenatchee Valley Branch, Seattle-First National Bank to pay said check. Said check was redeposited by the defendant with the Ritzville Branch of the Old National Bank for collection and was received from said Ritzville Branch by the Wenatchee Valley Branch of the Seattle-First National Bank on January 27, 1947, but was not then paid because the Chemurgy account with said bank was then overdrawn and remained overdrawn until February 3, 1974, at which time the check was paid out of the account

of Northwest Chemurgy Cooperative with said Seattle-First National Bank, Wenatchee Valley Branch."

The agreed statement also presented a single "Question for Decision" by the trial court, reading as follows:

> "The question for decision by the court under the facts of this case is whether or not the payment of said check by the Wenatchee Valley Branch of The Seattle-First National Bank on February 3rd, 1947, out of the account of Chemurgy in said bank was a preference in the amount of $1627.50 within the meaning of a preference as defined in Rem. Rev. Stat. §5831-4(c)" (Tr. 13).

The court's answer to this question is found in its Conclusion of Law I (Tr. 26-27) reading as follows:

> "That payment of said check out of the funds of Chemurgy on deposit with the Wenatchee Valley Branch of The Seattle-First National Bank on February 3, 1947, was not such a transfer to the defendant of the property of said insolvent Northwest Chemurgy Cooperative as to constitute an unlawful preference within the meaning of Rem. Rev. Stat. of the State of Washington, §5831-4, as the transaction was in substance and effect a cash transaction and there was no intent on the part of either party to create a debtor-creditor relationship."

SPECIFICATION OF ERRORS

1. The court erred in entering that portion of Finding of Fact III reading:

> "That the plaintiff has failed to sustain the burden of proving the transaction constitutes an unlawful preference and was other than a cash transaction" (Tr. 26).

for the reasons:

> (a) That the facts stipulated prove that the payment of the check referred to in Finding II on February 3, 1974, was a preference within the meaning of Rem. Rev. Stat. of the State of Washington, §5831-4, and
>
> (b) That the transaction referred to in said Finding II was not a cash transaction and,
>
> (c) Said finding of fact is not contained in the stipulation of facts.

2. The court erred in drawing Conclusion of Law I (Tr. 26-27) to the effect that payment of the check here involved out of the funds of Chemurgy on deposit with its bank on February 3rd, 1947 was not such a transfer to appellee of the property of said insolvent Northwest Chemurgy Cooperative as to constitute an unlawful preference within the meaning of Rem. Rev. Stat. of the State of Washington, § 5831-4 as the transaction was in substance and effect a cash transaction and there was no intent on the part of either party to create a debtor-creditor relationship, for the reasons:

> (a) The Conclusion of Law to be drawn from the stipulated facts was that the payment on February 3rd, 1947, referred to in Finding II was a preference within the meaning of Rem. Rev. Stat. §5831-4.

(b) The transaction referred to therein was not a cash transaction as held by the court.

(c) The evidence, facts and Findings of Fact do not support the statement "* * * there was no intent on the part of either party to create a debtor-creditor relationship."

(d) The intent of the parties is immaterial.

3. The court erred in entering Conclusion of Law II that defendant was entitled to have judgment dismissing the complaint for the reason:

(a) The stipulated facts and pertinent law require the entry of judgment as prayed for in the complaint.

4. The Court erred in entering judgment dismissing the complaint for the reasons:

(a) The stipulated facts require as a conclusion of law that the payment to defendant of the sum of $1627.50 on February 3, 1947, was a preference in said amount within the meaning of Rem. Rev. Stat. §5831-4(c) and was recoverable under Rem. Rev. Stat. §5831-6 by the appellant herein from the appellee.

5. The court erred in not answering the question for decision specifically presented by the agreed statement of facts by holding that the payment of said check out of the bank account of Chemurgy on February 3rd, 1947 was a preference in the amount of said check within the meaning of a "preference" as defined in Rem. Rev. Stat. §5831-4(c).

6. The court erred in not entering as a conclusion of law the conclusion that the payment of said check out of the funds of Chemurgy on February 3rd, 1947

was a transfer to the appellee of the property of said insolvent Northwest Chemurgy Cooperative within the meaning of Rem. Rev. Stat. §5831-4 and a preference recoverable by the plaintiff from the defendant under Rem. Rev. Stat. of the State of Washington §5831-4 and 5831-6.

7. The court erred in not entering judgment as prayed for in the complaint for the reasons stated in the foregoing paragraphs 1 to 6.

ARGUMENT

The appellant's Statement of Points on Appeal are set forth on pages 37 and 38 of the transcript, and may be summarized as follows:

I.

In determining whether a payment of money by an insolvent corporation is a preference within the meaning of the Washington statutes, the intent of the parties is immaterial — the determination is made on the basis of the effect of the payment in diminishing the funds of the corporation in payment of a pre-existing obligation.

II.

The obligation here involved arose on January 3, 1947, the date on which appellee sold and delivered wheat to Chemurgy. The preferential transfer occurred a month later on February 3, 1947 when the wheat was paid for out of the account of Chemurgy by its bank.

III.

Said transaction was not a "cash transaction" since

the seller (appellee) did not receive payment for said wheat when he sold and delivered it.

IV.

The payment out of the bank account of Chemurgy on February 3, 1947 to appellee for said wheat was a preference recoverable by appellant as Trustee in Bankruptcy under Rem. Rev. Stat. of the State of Washington § 5831-4 and § 5831-6.

All of the record on appeal was designated as material to the consideration of this appeal.

Since each of the points on appeal involve all, or at least portions of all, of the Specifications of Error, the case will be argued by appellant under the first three of the foregoing "Statement of Points" and each of said points will be deemed in support of each of the specifications of error. The fourth point logically follows from the first three points.

I.

In determining whether a payment of money by an insolvent corporation is a preference within the meaning of the Washington statutes, the intent of the parties is immaterial—the determination is made on the basis of the effect of the payment in diminishing the funds of the corporation in payment of a pre-existing obligation.

The trial court erroneously concluded (Conclusion of Law I—Tr. 26-27) that there was no intent on the part of either party to create a debtor-creditor relationship. The agreed statement of facts does not support this conclusion.

As opposed to the court's conclusion which has no basis in fact is the legal relationship of debtor and creditor created by the sale and delivery of the wheat.

Preferences made within four months before the date of application for the appointment of a receiver (trustee) may be avoided and the property or its value recovered by such receiver (trustee).

> "Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver * * *" Rem. Rev. Stat. §5831-6.

It has been conclusively established that February 3, 1947, the date of the payment out of the bank account of Chemurgy to appellee was within the four-months period referred to in the above-quoted Rem. Rev. Stat. § 5831-6. *Engstrom v. DeVos,* 81 F.Supp. 854, affirmed *Schneidmiller v. Engstrom,* 177 F.(2d) 196.

The chronology of events clearly establishes a preferential payment under the Washington statute:

> January 3, 1947—Wheat sold and delivered by appellee to Chemurgy but not paid for (Finding II, Tr. 25);
>
> January 29, 1947 — commencement of the four-months period within which payments constitute preferential payments recoverable by the Trustee in Bankruptcy (this date as to this bankruptcy was authoritatively established by *Engstrom v. DeVos* and *Schneidmiller v. Engstrom, supra*);
>
> February 3, 1947 — payment for said wheat by Chemurgy out of its funds on deposit in the We-

natchee Valley Branch of The Seattle-First National Bank (Finding II, Tr. 21).

Upon obtaining title as aforesaid to said wheat, Chemurgy of course became a debtor of the appellee Benzel and Benzel became a creditor of Chemurgy.

> "Whenever one person by contract or by law is liable and bound to pay another an amount of money certain or uncertain, the relation of debtor and creditor exists between them." 18 C.J. 24.

Some other definitions indicating the broad relationship of debtor and creditor are:

> "One who has a right to require of another the fulfillment of a contract or obligation." *In re Putman* (D.C. Cal.) 193 F. 464, 473.

> "One in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money." *Pierson v. Hickey,* 16 S.D. 46, 91 N.W. 339, 340.

> "One who has the right to require the fulfillment of an obligation." *In re Wilhelm* (D.C. Md.) 25 F. Supp. 440, 443.

> "One who has a right by law to demand and recover of another a sum of money on any account whatever." *Conrad v. Johnson,* 134 Kan. 120, 4 P. (2d) 767, 769.

Since a Washington statute is the basis of this action, the interpretation of such statute by the Washington court is of course controlling. A number of recent Washington cases interpreting the statute clearly demonstrate that the payment here involved was preferential and recoverable by the appellant as trustee.

They hold that the intent of the parties is immaterial and the test is whether or not the estate of the bankrupt is diminished within the four months period by the transfer to the creditor.

Seattle Association of Credit Men as Assignee v. P. D. Luster, 137 Wash. Dec. 181 (1950), 222 P.(2d) 843, was an action brought to recover an alleged preference under the statute here involved. The action involved three checks made payable to the defendant and paid by the insolvent's bank within the four-months period. The transactions giving rise to the payment of the checks in suit developed in the following manner: The insolvent ordered a planer from the defendant to be shipped to a lumber company in Georgia, and sent, with its purchase order, two checks drawn on the insolvent's bank account. One check constituting the initial down payment on the planer was paid prior to the four months and not involved. The second check for the balance of the price of the planer was submitted by a memorandum stating that the check was to be held until the customer had paid for the shipment in full. This second check in the sum of $5,335.00 was paid out of the insolvent's account within the four-months period. The insolvent also ordered another saw submitting two checks, the first of which was deposited immediately upon receipt and was paid by the insolvent's bank within the four-months period and the second check was also paid within the four-months period. The Supreme Court reversed the trial court and ordered judgment for the plaintiff on all three of said checks paid within the four-months period. The

Supreme Court overruled the contention of the defendant that he only intended to deal on a cash basis, stating:

> "It appears to be the contention of respondents here that North End was never an antecedent creditor of Hosmer, since, as they allege, it was the understanding of the parties that North End was to retain title to the machines until Hosmer had paid for them. The agreements between Hosmer and North End, respondents assert, amounted to no more than contracts to sell, and the sales themselves did not take place until the checks, previously delivered by Hosmer to North End were cashed. Thus, no credit was ever extended to Hosmer, and the sales were cash transactions, since title to the machines, in respondents' view, did not pass until the time that they received their money. From this it would follow that Hosmer's estate was in no degree diminished by the cashing of the checks, and it is respondents' position that there was, consequently, no preference and that *Stern v. Lone* has no application to the present situation."

The court in overruling this contention did so in language equally applicable to such a contention by the defendant (appellee) here. The court stated:

> "The essential problem, therefore, is to determine when the sales transactions were consummated. If they remained executory until North End cashed the checks, then there was no preference in either of the transactions, for North End received adequate consideration for them at that time. If, on the other hand, the sales were completed when North End received the orders and released possession of the machines, the transfers

of money resulting from the subsequent cashing of the checks, amounted to payments on an antecedent debt, and must be regarded as preferences.

"In spite of the repeated insistence of respondent P. D. Luster, sole proprietor of North End, that he only intended to deal on a cash basis, it would seem that the latter is the correct view. Where the circumstances of the case indicate that a given transaction amounts to an extension of credit, it will be treated as such, regardless of whether the parties have so considered it. *Seattle Ass'n of Credit Men v. Daniels,* 15 Wn.(2d) 393, 130 P.(2d) 892. And, as Williston says:

" 'Confusion may be caused by use of the words "cash sale" or "terms cash" by business men. In business dealings these words are frequently used when in reality a short period of credit is contemplated. In such a case it is clear that there is no cash sale in the legal sense. Under the circumstances suggested, it is not contemplated that the buyer shall refrain in the meantime from dealing with the goods or even from reselling them, and if such is the contemplation of the parties, it is impossible to say that the property was not to pass until the price was paid.' 2 Williston on Sales (Rev. Ed.) 335, §343.

* * * * *

"It is thus apparent that North End parted with all dominion and control over the machines. Substantially the only evidence tending to show that it retained the title to them consisted of Mr. Luster's statements, made after the fact of Hosmer's insolvency, that it had been his intention to retain the title. Perhaps it was. The trial judge thought so. But whatever Mr. Luster's intention may have

been, it could not alter the legal effect of his actions. If it was indeed his purpose to require that he be paid for the machines prior to passage of title, he waived this requirement by permitting Hosmer to ship the machines to its own subpurchasers, sell them, and take over the proceeds, without insisting on payment in full. *Weyerhaeuser Tbr. Co. v. First Nat. Bank,* 150 Ore. 172, 38 P.(2d) 48, modified 150 Ore. 172, 43 P.(2d) 1078; *Northwest Hardware Co. v. M. & S. Logging Co.,* 132 Wash. 413, 232, Pac. 274.

"The sales having been consummated on December 23rd and December 26th, respectively, North End became a creditor of Hosmer for the obligations in question on those dates. The cashing of checks Nos. 7437, 7349, and 7350 amounted to payments against these obligations, and, since they occurred within four months prior to Hosmer's assignment for the benefit of his creditors, must be held to have been preferential transfers within the meaning of Rem. Supp. 1941, §5831-4(c). Appellant is, therefore, entitled to avoid them."

The Washington case of *Seattle Assoc. of Credit Men v. Daniels,* 15 Wn.(2d) 393, 130 P.(2d) 892, also emphasizes that the intention of the parties as to the extension of credit is immaterial. The court there stated:

"It would seem clear that the payment made by appellant to respondents on April 10th was upon an antecedent debt. Under the express terms of the contract, the account was payable 'upon presentation of receipted bills and pay roll,' which was

when 'audited and found correct to be paid in full.' The receipted bills and statement were presented, audited, and found correct on March 22nd. Payment was not then made. In other words, the account was not paid when due nor at the time the materials were furnished and the services rendered. Consequently, the respondents became general creditors of Eba's Inc. When payment was made on April 10th, it was for an antecedent debt and constituted a preference under Rem. Rev. Stat., §5831-2. *Seattle Ass'n of Credit Men v. Bank of California,* 177 Wash. 130, 30 P.(2d) 972. That the parties did not regard nor intend the transaction as an extension of credit, makes the payment nonetheless a preference. Nor does usage or custom in payment of bills make it any less so. *In re John Morrow & Co.,* 134 Fed. 686. Of a closely analogous situation, the court in that case said, p. 687:

" 'If the parties, by agreement, can treat a sale of goods on 10 days' time as a cash transaction, they may also, by agreement, treat a sale on 30 or 60 days' or longer time as a cash transaction, and practically defeat the operation of sections 57g and 60a of the bankrupt act (30 Stat. 560, 562 (U.S. Comp. St. 1901, pp. 3443, 3445)). Sections 57g and 60a of the bankrupt act do not contemplate a usage of merchants or a conventional arrangement between the parties which would enable any one of the creditors of a bankrupt to obtain a greater percentage of his debt than any other of such creditors of the same class. A sale of goods to be paid for in 10 or 30 days is not, in fact, a cash transaction, and cannot, by agreement of the parties, or a usage of merchants, be regarded as such within the meaning of the bankrupt law'." *Seattle Ass'n. of Credit Men v. Daniels,* 15 Wn.(2d) 393 at pages 397, 398.

II.

The obligation here involved arose on January 3, 1947, the date on which the appellee sold and delivered wheat to Chemurgy. The preferential payment occurred a month later when the wheat was paid for out of the account of Chemurgy by its bank.

It has been demonstrated under Point I above that the obligation of appellee to Chemurgy arose when the wheat was sold and delivered prior to the four-months period to Chemurgy. The check itself was evidence that an indebtedness existed.

> "Under the law, a check is an instrument by which a depositor seeks to withdraw funds from a bank. As between the drawer and the payee, it is an evidence of indebtedness. Usually a check is given for money borrowed or a debt contracted, and, in commercial transactions, as well as in law, it is equivalent to the drawer's promise to pay, and an action may be brought thereon as upon a promissory note. 1 Morse, Banks & Banking, §388. The check then in controversy in this case was an obligation on the part of H. E. Newman & Sons to pay a debt to the plaintiff, and, when payment was declined by the drawee, the plaintiff had a right of action to recover the debt of which such check was a mere evidence." *Camas Prairie State Bank v. Newman,* 15 Idaho 719, 99 Pac. 833 at page 834.

The check did not create the obligation. The obligation was created by the sale and delivery to Chemurgy. The check was the admission by Chemurgy of the existence of an obligation.

> "The giving of a check is not the creation of an obligation, but is merely the admission by the

drawer of the existence of an obligation to pay a certain sum of money." *Peninsula National Bank v. Peterson Construction Co.,* 91 Wash. 621, 158 Pac. 246 at page 247.

The payment of this antecedent obligation evidenced by said check occurred when the check was paid within the four-months period.

The cashing of a check within the four-months period effects a preferential transfer which may be avoided notwithstanding that the check was delivered prior to the beginning of the four-months period, *Stern v. Lone,* 32 Wn. (2d) 785, 203 P.(2d) 1074 (quoted *infra*).

III.

Said transaction was not a "cash transaction" since the seller (appellee) did not receive payment for said wheat when he sold and delivered it.

This was not a cash sale. In a cash sale the seller "declines to transfer either title or right to possession until he is paid." 2 Williston on Sales, Revised Edition, 324, § 341. By the agreed facts title and possession passed from appellee on January 3, 1947 and he was not paid until a month later. The court found that the wheat was sold and delivered on January 3rd, 1947. It is very clear that appellee made no attempt to reserve title until he was paid. The letter transmitting the warehouse receipt (Exhibit A, Tr. 16-17) did so with no reservations, and by the postscript also recognized that a check would not be mailed until after the warehouse receipt was received by Chemurgy. The postscript reads: "P.S. Mail check to Mr. Art Benzel, Ralston, Wn." (Tr. 17). The account statement set forth in the

statement of facts (Tr. 14) shows that certain computations and deductions were required before a check could be prepared.

The delivery of the warehouse receipt vested title to the wheat in Chemurgy. Rem. Rev. Stat. of the State of Washington §3627 provides with respect to the vesting of title by the delivery of a negotiable warehouse receipt as follows:

> "*Rights of person to whom a receipt has been negotiated.* A person to whom a negotiable receipt has been duly negotiated acquires thereby, (a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and (b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. (L. '13, p. 282, §41).

The Uniform Sales Act which also has been adopted by the State of Washington also provides (Rem. Rev. Stat. §5836-33) that the negotiation of a negotiable document of title immediately transfers the title to the goods previously owned by the endorser. Said section provides:

> "*Rights of Person to whom document has been negotiated.* A person to whom a negotiable document of title has been duly negotiated acquires thereby: (a) Such title to the goods as the person negotiating the document to him had or had ability

> to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value: and (b) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him."

Chemurgy was free to deal with the wheat as its own from the moment it received the warehouse receipt. Therefore the following from *Seattle Association of Credit Men v. Luster,* 137 Wash. Dec. 181, 22 P.(2d), 843, quoting Williston is relevant and applicable:

> "Under the circumstances suggested it is not contemplated that the buyer shall refrain in the meantime from dealing with the goods or even from reselling them, and if such is the contemplation of the parties, it is impossible to say that the property was not to pass until the price was paid."

The mailing of the check after the delivery of the wheat was of course not payment for the wheat and it in no wise affected the debt arising by reason of the sale of the wheat to Chemurgy; *Stern v. Lone,* 32 Wn.(2d) 785, 203 P.(2d) 1074, *infra; National Market Co. v. Maryland Casualty Co.*, 100 Wash. 370, 170 Pac. 1009, 174 Pac. 479 (quoted in *Stern v. Lone*); *Anderson v. National Bank of Tacoma,* 146 Wash. 520, 264 Pac. 8. The District Court therefore erred in holding that the "transaction was in substance and effect a cash transaction" (Tr. 22).

Even if the Statement of Agreed Facts had contained

a statement that the parties intended a cash transaction, such intention under the actual circumstances, would have been immaterial. The following holding in *Seattle Association of Credit Men v. Daniels,* 15 Wn.(2d) 393, 130 P.(2d) 892, provides a complete answer to the District Court's reliance upon its unjustified conclusion that there "was no intent on the part of either party to create a debtor-creditor relationship." (Tr. 22).

> "That the parties did not regard nor intend the transaction as an extension of credit, makes the payment nonetheless a preference." *Seattle Association of Credit Men v. Daniels,* 15 Wn.(2d) 393, 130 P.(2d) 892.

As will be noted from the above quotation from *Seattle Association of Credit Men v. Luster,* the Supreme Court of Washington unqualifiedly held in *Stern v. Lone,* 32 Wn.(2d) 785 (1949), 203 P.(2d) 1074, that checks cashed within the four-months period preceding application for the appointment of receiver for the maker, effected a preferential transfer which may be avoided by the receiver notwithstanding that the checks were delivered prior to the beginning of the period. In the *Stern* case the defendant, a farmer, had delivered a considerable amount of corn to the Ingalls Packing Corporation which was delivered by Lone prior to the date four months before application was made for a receiver for Ingalls Packing Corporation. The check was honored by Ingalls' bank within the four-months period. The defendant contended that the preference was made when the check was delivered to him and this date being prior to the four-months period the

receiver could not recover the payment. The receiver contended that the preference was made when the insolvent's bank cashed the check within the four-months period. In holding for the receiver and reversing the trial court the Supreme Court stated:

> "'The appellant opens his argument by citing Rem. Rev. Stat. §3579 (P.P.C. §751-9), which reads as follows:
>
> "'A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.'
>
> "This statutory provision has been applied in numerous Washington decisions. *Lincoln County v. Gibson,* 143 Wash. 372, 255 Pac. 119; *Whorf v. Seattle Nat. Bank,* 173 Wash. 629, 634-635, 24 P.(2d) 120. It was held in *National Market Co. v. Maryland Cas. Co.,* 100 Wash. 370, 380, 170 Pac. 1009, 174 Pac. 479, an En Banc decision correcting a previous Departmental opinion in the same cause:
>
> "'The fundamental error in our former opinion was the holding that the indorsement and delivery of the check was the assignment of the debt, instead of its being simply and only what the negotiable instruments law provides it shall be. The ordinary bank check is not, either in law or in equity, an assignment of the fund upon which it is drawn (Rem. Code, § 3579), but is purely and simply an order for the payment of money, which in nowise affects the debt for which it is given until the order is paid; and being dishonored, leaves the drawer still indebted to the payee, the

same in all respects as though the check had never been drawn and delivered. Moreover, such a check is revocable by the drawer at any time before it is paid. *Peoples' Sav. Bank & Trust Co. v. Lacey,* 146 Ala. 688, 40 South 346; *Pease & Dwyer v. State Nat. Bank,* 114 Tenn. 693, 88 S.W. 172; *Kaesemeyer v. Smith,* 22 Idaho 1, 123 Pac. 943; Ann. Cas. 1914C 665, 43 L.R.A.(N.S.) 100.'

"Later, in the case of *Anderson v. National Bank of Tacoma,* 146 Wash. 520, 525, 264 Pac. 8, it was said by this court:

" 'We have accordingly many times held that the ordinary bank check is not, either in law or equity, an assignment of the funds upon which it is drawn (§ 3579 supra), but is purely and simply an order for the payment of money which in nowise affects the debt for which it is given until the order is paid. *National Market Co. v. Maryland Casualty Co.,* 100 Wash. 370, 170 Pac. 1009, 174 Pac. 479, 1 A.L.R. 450.' * * *

"We are, of course, not here concerned with what constitutes payment with respect to the statute of frauds, nor are we primarily concerned with the date when Lone received 'payment' for his corn. Our statutory definition of 'preference,' quoted earlier in this opinion, contemplates two kinds of preferences: (1) suffering a judgment, and (2) a *transfer* of any of the property of the corporation. No judgment is involved in this case. We are primarily concerned here with whether or not the property of the corporation was diminished by a transfer of corporate property to Lone, and if so, was the transfer made more than four months before May 9, 1947, or within that four months?

In deciding the question before us, the word 'transfer' is the key word, not 'payment.'

"The provisions of the Federal bankruptcy act are so similar to those of our insolvent corporations act (Laws of 1941, chapter 103) that there are many decisions of the Federal courts which are in point. We will, however, in an effort to attain reasonable brevity, refer to them only incidentally. In the opinion in *Continental Trust Co. v. Chicago Title & Trust Co.*, 229 U.S. 435, 443, 57 L.ed. 1268, 33 S.Ct. 829, the supreme court of the United States said:

" 'To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate.'

"In 4A Remington on Bankruptcy (5th ed.) 265, § 1713, discussing 'Voidable Preferences,' the author says:

" 'Unless property is actually transferred to a creditor, there can be no diminution of the estate.'

"That is also true under our statute on insolvent corporations.

"It seems clear to us that no transfer of property was made by the delivery of the check to Lone on some day during the last week of 1946. It follows that the corporation's property was in no way diminished when the check was delivered to Lone, since he then received no property of the corporation, other than a piece of paper, by means of which he could in the future secure some of the corporation's money, if the corporation did not in the meantime stop payment of the check and there

was still sufficient of the corporation's money remaining on deposit in the bank to honor the check at the time it was presented. As it happened, there was, and it did honor the check on January 25, 1946, and Lone at once received the money through the Kent bank. It was when the check was cashed that corporate assets were transferred and a preference made. That was late in January, 1947, and within four months before May 9, 1947, the date of the application for the appointment of a receiver, and therefore a preference, which could be avoided and a recovery had from Lone by the receiver, under the Laws of 1941, Chapter 103, § 3, p. 272, Rem. Supp. 1941 § 5831-6. * * *

"For the foregoing reasons, we are of the opinion that the corporation's estate was diminished when the check was cashed, not when it was delivered; that is to say, the diminution occurred late in January, 1947, and well within the four months prior to the appellant's application for a receiver on May 9, 1947. It follows that the judgment appealed from must be reversed, and that will be the ruling of this court.

"It is further ordered that the existing judgment be set aside and a new judgment entered in accordance with the prayer of the complaint and consistent with this opinion."

Unless the creditor holds a security all inquiry regarding the status of a preference is limited to what took place within the four-months period.

In the case of *Seattle Assoc. of Credit Men v. Hudson Machinery Company,* 135 Wash. Dec. 643 (1950), 214 P.(2d) 681, the defendant had sold to the insolvent a motor prior to the four-months period and re-

ceived payment one day within the four-months period. The defendant there contended that it had not received a preference because

> "* * * of the nature of this transaction, whereby the payment made by the insolvent was balanced by funds or property supplied by the creditor, respondent is in a different class than other unsecured creditors."

The Supreme Court in overruling this contention and reversing the trial court and ordering judgment for the receiver stated:

> "The answer is no. Respondent does not claim any priority by reason of the various statutes creating liens or otherwise establishing priority of debts. (See, for example, Rem. Rev. Stat. §§1129, 1131-4, 1132, 1141, 1149, 1154, 1156, 7682, 11260.) Respondent was not entitled to a greater percentage because of any security it held, for it held none. It is this fact which distinguishes the instant case from the cases cited by respondent (citing cases).
>
> "Respondent was not entitled to a greater percentage because of credit extended to the insolvent in connection with the sale of the motor, whether or not the motor was resold at a profit, for the state preference act expressly limits any setoff to credit or credits given wholly within the four months' period. * * *
>
> "Since respondent, as a *claimant* against the estate of the insolvent, would not have been entitled to a greater percentage of its claim than any other unsecured creditor, then, under the test referred to above, it was in the same class with them. The payment in question was accordingly a preference. Since the preference was extended

within the four months' period, it was voidable and recoverable in this action. Rem. Supp. 1941, § 5831-6.

"Respondent, in its argument, has emphasized the fact that the motor was resold at a profit. To the extent that this is intended to show that respondent is in a different class than other unsecured creditors, it is answered by what has been said above. On the other hand, if it is contended that this circumstance shows that the payment in question did not diminish the insolvent's estate, and so was not a transfer of property within the meaning of the act, such contention is negatived by the express term of Rem. Supp. 1941, § 5831-7, quoted above.

"Whatever may have been the law prior to the enactment of the state preference act in 1941, the legislature has now provided, with respect to preference payments made in discharge of unsecured credits, a definite cut off date, represented by the beginning of the four months' period. There may be inquiry beyond that date with respect to any claim that a preference represents payment of a credit which has priority or lien protection under statute, or which is secured by agreement of the parties. But absent such a claim, all inquiry regarding the status of a preference is limited to what took place within the four months' period. Thus secured or unsecured credits received by the insolvent from the creditor within four months' period may be set off against the preference, whether or not the insolvent made a profit on the transaction. But credits received by the insolvent from the creditor prior to the four months' period, unless enjoying statutory priority or secured in

some manner, may not be set off or taken into consideration in any other way, whether or not the insolvent made a profit on the transaction.

"For the same reason, that is, that the cut off date provided in Rem. Supp. 1941, §5831-7, is now controlling as to the type of transaction in question, respondent's other contentions to the effect that the sale of the motor and the payment were made 'contemporaneous'; that the payment was made 'in the ordinary course of business'; and that the payment was made in connection with a transaction the 'net result' of which was to increase the value of the estate, are inapposite, assuming that they are meritorious in other respects."

Even if the District Court intended by its conclusion that the transaction was a cash transaction in the "popular sense" because a check was to be mailed after the warehouse receipt was received, such conclusion would not sustain a finding that the ultimate payment of the check was not a statutory "preference." The determining point is that the funds of the insolvent corporation were diminished within the four-months period (by payment out of it bank account) for a debt created prior to the four-months period. This is emphasized in the following quotation from *Stern v. Lone,* 32 Wn.(2d) 783, 203 P.(2d) 1074, the court stating:

"We are, of course, not here concerned with what constitutes payment with respect to the statute of frauds, nor are we primarily concerned with the date when Lone received 'payment' for his corn. Our statutory definition of 'preference' quoted earlier in this opinion, contemplates two

> kinds of preferences: (1) suffering a judgment, and (2) a transfer of any of the property of the corporation. No judgment is involved in this case. We are primarily concerned here with whether or not the property of the corporation was diminished by a transfer of corporate property to Lone, and if so, was the transfer made more than four months before May 9, 1947, or within that four months? In deciding the question before us, the word 'transfer' is the key word, not 'payment'."

The determination of whether a payment is preferential when a transfer is made to an unsecured creditor is dependent solely upon what occurs within the four-months' period. See *Seattle Assoc. of Credit Men v. Hudson,* 135 Wash. Dec. 643, 214 P.(2d) 681, quoted above.

SUMMARY AND CONCLUSION

Appellant contends:

(a) That appellee became a creditor of Chemurgy on January 3, 1947 when he sold and delivered wheat to Chemurgy (said date is prior to the commencement of the four-months' statutory preference period);

(b) On February 3, 1947 (which is within the four-months' statutory preference period), the sum of $1,627.50 was transferred from the assets of Chemurgy to appellee in payment of said debt;

(c) Since this payment diminished the assets of Chemurgy and was in payment of an existing obligation it was a "preference" within the meaning of the Washington preference statute (Rem. Rev. Stat. § 5831-4(c)) and recoverable by the appellant as trustee (Rem. Rev. Stat. § 5831-6).

Appellant submits that the judgment of the District Court should be reversed with instructions to enter judgment for appellant as prayed for in the Complaint.

Respectfully submitted,

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